

TRANSPARENCY AND RULE-MAKING IN AUSTRALIA

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The absence at common law of an obligation of rule-makers to consult before making rules, or even to publish the rules, leaves any attempt to secure transparency in rule-making in Australia to statutory intervention.¹ Statute has traditionally played an important but limited part.

In Australia formal statutory requirements for the making of delegated legislation have followed the Westminster tradition. When rules of a legislative character, or delegated legislation, are made, they must be notified in the government gazette, scrutinised by a parliamentary committee, tabled in parliament with the potential for disallowance, and published in a formal manner. These requirements are set out in federal, State and Territory interpretation statutes. They achieve only a basic degree of transparency.

The interpretation statutes have not traditionally provided for public notification in advance of the making of a proposed rule, or consultation with individuals or groups whose interests it affects. Requirements for consultation have featured in particular statutes, typically those regulating planning or the environment, but there was no general statutory requirement for consultation in rule-making, such as the notice and comment requirements in the United States.

This paper traces the genesis of general statutory requirements in Australia for notice and consultation in rule-making, occurring at the State level, with a view to understanding the current federal general provision relating to notice and consultation. Attention will be given to the link, if any, between general requirements for notice and consultation, and requirements for regulatory impact assessment, whether statutory or informal. In the background is the consideration that the omission of a genuine consultation component in rule making processes may impair not only the democratic good of participation in government decision-making but also the effectiveness of regulatory impact assessment.

§ 1 – GENESIS OF REFORM

In 1984 Victoria was the first of the Australian States to introduce statutory requirements to prepare and notify regulatory impact

¹ See, for the common-law position, *Re Gosling* (1943) 43 SR (NSW) 312 at 318; *Bread of New South Wales Manufacturers v Evans* (1981) 180 CLR 404 at 415; *Kioa v West* (1985) 159 CLR 550 at 584, 620, adopting the position in the United Kingdom in *Bates v Lord Hailsham* [1972] 3 All ER 1019 at 1024.

statements when making rules, and to consult with interest groups when the rules are made.² This was accompanied by sun-setting provisions that trigger regular review of rules in accordance with this process. The Victorian reform followed a report that expressly accepted that consultation by government with the public in relation to policies or decisions that affect the public generally or particular localities or groups, is a desirable goal in a democratic system, enhancing participation by individuals in government decision-making and effective public administration.³ Interest groups were acknowledged to play a vital role in facilitating consultation.⁴ Processes should be put in place to enable public interest groups to enjoy consultation in rule-making to the same degree as is informally provided to business and trade union groups.⁵

Specific recommendations of the Committee, confirming and refining the provisions of the bill under review, were that notice be given of a proposed rule not just in the government gazette and a daily newsletter, as provided for in the bill, but also where appropriate in a trade, professional, business and/or public interest journal, newsletter or circular.⁶ Copies of the regulatory impact statement (RIS) for the rule should be made available on request, with any copying fee being reasonable.⁷ Public comments and submissions should be invited, not necessarily within 21 days as provided for in the bill, but within not less than 21 days.⁸ The bill's proposal that submissions received be considered by the rule-maker was considered to be appropriate.⁹

The Committee's views were heavily influenced by its examination of notice and comment rule making procedures in the United States and Canada.¹⁰ In connection with the argument for deregulation in Australia, the Committee considered that the introduction of rule-making requirements such as an RIS procedure was directed to ensuring that rules are in accordance with community needs.¹¹

In its report the Committee's examination of consultation¹² followed its consideration of deregulation, without an indication as to what may be the link between the two. The rationale for an RIS procedure was said to be enhancing decision-making by ensuring all possible information is available to the rule-maker.¹³

² Subordinate Legislation Act 1984 (Vic). This has now been repealed and replaced by the Subordinate Legislation Act 1994 (Vic). Parts 2 and 2A of the 1994 Act deal with RISs and consultation.

³ Victoria, Parliament, Legal and Constitutional Committee, A REPORT TO PARLIAMENT ON THE SUBORDINATE LEGISLATION (DEREGULATION) BILL 1983, September 1984, paras 85, 85.1.

⁴ Victoria, Parliament, Legal and Constitutional Committee, *op. cit.*, para 88.

⁵ Victoria, Parliament, *op. cit.*, paras 89, 89.3.

⁶ Victoria, Parliament, *op. cit.*, paras 187.1-188, Recommendation 56.

⁷ Victoria, Parliament, *op. cit.*, paras 191-192, Recommendation 58.

⁸ Victoria, Parliament, *op. cit.*, paras 193-194, Recommendation 59.

⁹ Victoria, Parliament, *op. cit.*, paras 195-196, Recommendation 60.

¹⁰ Victoria, Parliament, *op. cit.*, paras 50-56.5, 86.1-86.9.

¹¹ Victoria, Parliament, *op. cit.*, paras 57-65.

¹² Victoria, Parliament, *op. cit.*, paras 66-68.

¹³ Victoria, Parliament, *op. cit.*, para 79.4.

The Committee made an assumption that consultation with regard to an RIS would enable more information from interested groups with expertise in particular areas, so that competing economic, social and moral claims would be more adequately represented and evaluated. This should result in the making of rules that benefit the community to the optimum degree possible, rather than benefiting sectional interests, to the detriment of the whole community.¹⁴ Indeed the Committee assumed that an RIS procedure “accords with the principles of openness as embodied for example, in freedom of information legislation”,¹⁵ and enables interest groups to influence the rule-making process in a transparent manner.¹⁶ The Committee did not consider the possibility that an RIS procedure could be disconnected from consultation, or not include consultation with regard to the RIS itself.

Amendments were made to the bill, to implement the Committee’s recommendations. Following the enactment of the bill in 1984, and replacement legislation in 1994, the RIS, public notice and consultation provisions continue to be core requirements in the *Subordinate Legislation Act* 1994 (Vic) (Vic SL Act).¹⁷ Another important element of the Vic SL Act is sunseting of statutory rules after 10 years, with exceptions and room for postponements.¹⁸ This ensures that a fresh procedure of RIS, public notice and consultation is triggered regularly.

In 1989 New South Wales (NSW) followed Victoria.¹⁹ Tasmania followed in 1992²⁰ and Queensland in 1994.²¹ In 2001 the Australian Capital Territory (ACT) introduced a statutory RIS requirement, without provision for notifying the public of a proposed rule or for consultation.²² The NSW scheme is selected for analysis and comparison with the federal position, which is

¹⁴ Victoria, Parliament, *op. cit.*, para 79.5.

¹⁵ Victoria, Parliament, *op. cit.*, para 82.1.

¹⁶ Victoria, Parliament, *op. cit.*, paras 82.3, 82.6.

¹⁷ Subordinate Legislation (Review and Revocation) Act 1984 (Vic), inserting a new Part II into the Subordinate Legislation Act 1962 (Vic). The later Act was replaced by the Subordinate Legislation Act 1994 (Vic) (Vic SL Act), in which the provisions for RIS, notice and consultation were retained: Vic SL Act ss 6, 7, 10, 11, 12I. These provisions extended the requirements to cover “legislative instruments” as well as “statutory rules”. Additional provision was made for consultation in accordance with ministerial guidelines: Vic SL Act ss 6, 12C.

¹⁸ Vic SL Act ss 5, 5A.

¹⁹ Subordinate Legislation Act 1989 (NSW) (NSW SL Act).

²⁰ Subordinate Legislation Act 1992 (Tas) s 5, Sch 2.

²¹ The Statutory Instruments and Legislative Standards Amendment Act 1994 (Qld) inserted a new Part 5 into the Statutory Instruments Act 1992 (Qld), providing for guidelines for regulatory impact statements and public notification. Sunseting was provided for in Part 7 although this had been introduced earlier, by the Regulatory Reform Act 1986 (Qld). The current provisions require an explanatory note accompanying subordinate legislation to include a regulatory impact statement for significant instruments and a similar assessment for other instruments, with an explanation of the consultation program: Legislative Standards Act 1992 (Qld) s 24.

²² Legislation Act 2001 (ACT) Part 5.2 (noting in particular ss 34, 35). This Act applies to “subordinate laws” and “disallowable instruments”. Section 32 of this Act provides that Part 5.2 does not affect any requirement in any other ACT law for publication or consultation about a proposal to make a subordinate law or disallowable instrument, and that if some other ACT law imposes publication or consultation requirements of a comparable level, Part 5.2 does not apply. This is a curious provision given that Part 5.2 imposes no consultation requirement.

described later. In NSW, as in Victoria, an RIS procedure is combined with notice and consultation requirements.

§ 3 – NEW SOUTH WALES

A) Public Notices of Proposed Rule and Regulatory Impact Statements

The introduction in NSW of general provisions for RIS, notice and consultation, in the *Subordinate Legislation Act* 1989 (NSW) (NSW SL Act), was preceded by a recommendation by a parliamentary select committee charged with reporting on the reduction of red tape for small business.²³ The committee recommended that the NSW parliamentary committee with the function of scrutinising delegated legislation should take into account whether a proposed rule had an impact upon small business. It also proposed a staged repeal of delegated legislation, with remaking only of those rules considered essential after detailed evaluation and public consultation.²⁴

The Regulation Review Act 1987 (NSW) (re-named in the Legislation Review Act 1987 (NSW)) which followed included, as one of the criteria to be applied by the parliamentary scrutiny committee, the question whether the rule may have an adverse impact on the business community.²⁵ The parliamentary scrutiny committee was named the Regulation Review Committee, but in 2002 was renamed the Legislation Review Committee, when it acquired an additional function of scrutinising bills.²⁶

Two years later the *Subordinate Legislation Act* 1989 (NSW) (NSW SL Act) was enacted, introducing an RIS procedure, notice and consultation requirements similar to those operating in Victoria. This step was preceded by a report of the Regulation Review Committee recommending the introduction of legislation similar to the Vic SL Act.²⁷ The report considered deregulation measures in several other countries, referring in particular to the Reagan Administration's establishment of the Office of Management and Budget, the issue of the 1981 Executive Order and later Regulatory Policy Guidelines.²⁸ The Committee did not doubt the desirability of including a consultation requirement akin to that in Victoria, stating its approach shortly:

“[...] the preparation of an RIS is not just an opportunity for government to reappraise Government options. One of

²³ New South Wales Parliament Select Committee of the Legislative Assembly Upon Small Business, Report No 1, REGULATION AND LICENSING.

²⁴ New South Wales Parliament Select Committee of the Legislative Assembly Upon Small Business, Report No 1, REGULATION AND LICENSING.

²⁵ NSW LR Act s 9(1)(b)(ii).

²⁶ Amendments made by the Legislation Review Amendment Act 2002 (NSW).

²⁷ New South Wales Parliament Regulation Review Committee, PROPOSAL FOR THE STAGED REVIEW OF NEW SOUTH WALES STATUTORY RULES FOR DISCUSSION, February 1989.

²⁸ New South Wales Parliament Regulation Review Committee, PROPOSAL FOR THE STAGED REVIEW OF NEW SOUTH WALES STATUTORY RULES FOR DISCUSSION, February 1989, pp 18-22.

their main purposes is to inform the public of the various options under consideration and of the anticipated impacts of each option so that affected members of the community can participate in government decision-making with a view to identifying the most efficient and equitable outcomes.”²⁹

The two NSW Acts work together, with the NSW SL Act providing for the RIS and the written submissions received in response to notice of a proposed statutory rule, to be forwarded to the Legislation Review Committee for scrutiny.³⁰ Thus, while the RIS requirement was not decoupled from a procedure for public notice and consultation, deregulation rather than consultation was the animating objective for these two statutes.

Before a statutory rule is made, the responsible Minister must, as far as is reasonably practicable, comply with the guidelines in Schedule 1 to the NSW SL Act.³¹ This imposes an onerous list of decision-making requirements, including cost-benefit analysis.³² Before any principal statutory rule is made, the responsible Minister must as far as is practicable prepare an RIS complying with Schedule 2.³³ The principal statutory rules are those with some substantive effect, as distinct from statutory rules that are simply direct amendments or repeals, or deal with citation and commencement, or are of a savings or transitional nature.³⁴ However there are significant exceptions to the requirement that the responsible Minister comply with the RIS, public notification and consultation procedures.³⁵ Where an exception operates, it

²⁹ New South Wales Parliament Regulation Review Committee, PROPOSAL FOR THE STAGED REVIEW OF NEW SOUTH WALES STATUTORY RULES FOR DISCUSSION, February 1989, p 44.

³⁰ NSW SL Act s 5(4).

³¹ NSW SL Act s 4.

³² The NSW SL Act applies only to the making of a class of delegated legislation. In Australia a statute may delegate legislative power to any member of the executive branch. This includes a Minister or statutory authority although more often the delegation is made to the Governor General or a Governor. The NSW SL Act applies only to “statutory rules”, which are regulations, by-laws, rules or ordinances made by the Governor or approved or affirmed by Governor (except for Schedule 4 instruments). By contrast, the NSW LR Act applies to “regulations” which are defined more broadly. The result is that pursuant to the NSW LR Act some legislative instruments are subject to scrutiny by a parliamentary committee and to potential disallowance, but are not subject to the RIS, public notification and consultation procedure under the NSW SL Act.

³³ NSW SL Act s 5.

³⁴ NSW SL Act ss 3 (definition of “principal statutory rule”), 4(2).

³⁵ Limitations firstly flow from the definition of statutory rule, as set out in note 26 above. The list of exceptions relation to the definition, in Schedule 4 to the NSW SL Act, includes standing orders of the Houses of Parliament, rules of court, by-laws of a university and rules made under a variety of specified statutes. Further limitations flow from the definition of “principal statutory rule”, as set out in the text accompanying note 28 above. In addition s 6(1)(a) empowers the Minister to certify that a proposed rule relates to matters set out in Schedule 3, which lists, *inter alia*, matters arising under federal, State or Territory uniform or complementary legislation; matters involving the adoption of international or Australian standards or codes of practice where assessment of costs and benefits has already been made; and matters not likely to impose an appreciable burden, cost or disadvantage on any sector of the public, having regard to any assessment of those issues by the relevant agency after application of the guidelines in Schedule 1. The Minister also has power to issue an excepting certificate where the rule is to be made by a person or body not expressly subject to the control of the Minister so that it is not practicable for the Minister to comply (s 6(1)(c)); and to postpone compliance with s 5

applies to all three elements: the RIS, the public notification and the consultation. In NSW sunseting, with exceptions and room for postponements, applies after five years, triggering a fresh process of review of the statutory rule.³⁶

The RIS is to state the objectives sought to be achieved by the proposed rule; the alternative options by which those objectives can be achieved; assessment of the costs and benefits of the rule; assessment of the costs and benefits of each alternative option to the making of the rule, including the option of not proceeding with any action; and assessment as to which of the alternative options involves the greatest net benefit or the least net cost to the community.³⁷ The RIS should also describe the consultation program to be undertaken.³⁸ The RIS requirement thus contemplates and supports the consultation process, providing a plan for eliciting comments from the public and offering a justification for the proposed rule to which the comments may be directed.

B) Consultation

The consultation required by the NSW SL Act is described in clear terms. A notice is to be published in the government gazette, in a daily newsletter circulating throughout NSW, and where appropriate in any relevant trade, professional, business or public interest journal or publication. The notice is to advise that it is proposed to make a statutory rule, that the RIS is available and how it may be obtained or inspected, and invite submissions within a specified time, but not less than 21 days from publication of the notice.³⁹ The persons to be consulted are “appropriate representatives of consumers, the public, relevant interest groups, and any sectors of industry or commerce, likely to be affected by the proposed statutory rule”.⁴⁰

The nature and extent of the publicity for the proposed rule and the consultation, is to be commensurate with the impact likely to arise for consumers, the public, relevant interest groups and any sector of industry or commerce, from the making of the statutory rule.⁴¹ Thus, while the NSW SL Act expressly requires that an opportunity be given to make submissions, whether an oral hearing is provided is a matter for discretionary judgment on the part of the responsible Minister, in light of the likely impact of the rule. While there is no requirement to give an oral hearing. That does not prevent a department or agency that prepares a proposed rule from voluntarily consulting with known stakeholders or arranging for public meetings to information sessions.

for 4 months on the ground that in the Minister’s opinion the special circumstances of the case the public interest requires that the rule be made (s 6(1)(b),(2)).

³⁶ NSW SL Act ss 10, 10A, 11, Sch 5.

³⁷ NSW SL Act Schedule 2(1)(a)-(e).

³⁸ NSW SL Act Schedule 2(1)(f).

³⁹ NSW SL Act s 5(2)(a).

⁴⁰ NSW SL Act s 5(2)(b).

⁴¹ NSW SL Act s 5(3).

All the comments and submissions received are to be appropriately considered.⁴² Once the rule has been made, and the process of receiving written submissions is completed, the RIS and written submissions are sent to the Legislation Review Committee.⁴³ The criteria to be applied by the Legislation Review Committee are set out in the NSW LR Act. One of the criteria is whether the responsible Minister appears not to have complied with the RIS, public notice and consultation procedures.⁴⁴ The Committee makes a report to both Houses of the NSW Parliament in which it may recommend disallowance of a rule on the ground of non-compliance with these procedures.⁴⁵

The duties to engage in cost benefit analysis, prepare an RIS, give notice, and consult, are expressed to apply “so far as is reasonably practicable”.⁴⁶ In addition the NSW SL Act expressly provides that non-compliance with the procedures does not render a statutory rule invalid.⁴⁷ In the absence of these “no invalidity” provisions, a statutory procedure for advertising a proposal to invite submissions, or a procedure requiring the consideration of submissions, could be expected to be “enforced” via administrative law. A court in judicial review would be likely to find that, on the proper construction of the relevant statute, the legislative intention was that non-compliance with the statutory procedure is to result in invalidity of the rule.⁴⁸ However the intention of the NSW SL Act is expressly stated. Non-compliance with the requirements for cost benefit analysis, preparation of an RIS, and consultation, does not render the statutory rule invalid. Accountability may be sought via a different branch of government, by one of the Houses of Parliament disallowing the rule on the recommendation of the Committee, on account of non-compliance with the procedures.

C) Review by a Parliamentary Committee

In the early days of the NSW SL Act, the Regulation Review Committee occasionally referred in its reports to submissions that the responsible Minister had forwarded to it. In rare cases, the Committee disclosed in a report that it had met with representatives of an interest group to discuss a proposed rule. Correspondence with the Minister responsible for making the rule could be included in the report, indicating the Committee’s invitation to reconsider aspects of the rule that the Committee

⁴² NSW SL Act s 5(2)(c).

⁴³ NSW SL Act s 5(4).

⁴⁴ NSW LR Act s 9(1)(b)(viii).

⁴⁵ NSW LR Act s 9(1)(c).

⁴⁶ NSW SL Act ss 4(1), 5(1).

⁴⁷ NSW SL Act s 9.

⁴⁸ The leading case on this principle, procedural ultra vires, is *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. In cases specifically concerned with statutory duties to “consider” a matter, or to “have regard to” submissions from the public, Australian courts have held that the decision-maker must direct an “active intellectual process” at the matter or submissions: *Tickner v Chapman* (1995) 57 FCR 451 at 462; *Tobacco Institute of Australia Ltd v National Health and Medical Research Council* (1996) 71 FCR 265 at 277.

considered infringed a statutory criterion. Ministerial responses, sometimes in terse language, were also included. This indicates that in some cases the Committee sought to enliven a process of deliberation with the rule-maker. However, there is no suggestion that the Committee adopted a course of requesting a responsible Minister to revisit a public consultation process or to enhance it by offering an oral hearing to interested persons or groups.

If the status quo remained as at the time of the Committee's report, with a ministerial refusal to amend the proposed rule so as to avoid infringement of a criterion, no doubt the report was sent to the Houses of Parliament recommending disallowance. The Committee does not provide a tally of disallowed rules in its annual reports. It is left to the interested researcher to assess the Committee's success rate in having its recommendations followed by Parliament, by searching Hansard records.

From 2002, when the Committee acquired the additional function of scrutiny of bills, the emphasis in its work quickly shifted to that new function. The Committee no longer publishes reports on its review of particular rules. It provides a digest with summaries of reviews of rules, giving little information about the kinds of submissions received. Of the statutory criteria the Committee applies, the most prominent is whether the proposed rule trespasses unduly on individual rights and liberties.⁴⁹

No suggestion has been made in any recent report that the Committee has given an oral hearing to any person or group that made a submission. Recommendations for disallowance are infrequently made. The Committee continues to give no inkling in its digest reports as to whether a House of Parliament has disallowed a statutory rule following its recommendation. In some cases, the digest report records that the Committee wrote to the responsible Minister expressing its concern about a proposed statutory rule not meeting one of the statutory criteria. The outcome of such consultation with the Minister is left uncertain.

D) A General Non-Statutory Process

Since 2008 the Better Regulation Office (BRO) within the NSW Department of Premier and Cabinet has monitored a non-statutory process of submitting a regulatory impact assessment with a new bill or proposed delegated legislation. The policy imposes requirements that overlap with those of the NSW SL Act.⁵⁰ It may

⁴⁹ NSW LR Act s 9(1)(b)(i). For example, the *Assisted Reproductive Technology Regulation 2014* re-made a regulation providing for the registration of ART providers, disclosure of information and record keeping in relation to gamete donation, and maintenance of a central register. The Committee considered whether the regulation trespassed unduly on individual rights and liberties because of its impact on the privacy of donors. However, the Committee took into account that the regulation was not retrospective, so that donors were aware of new regime, and made no further comment: Legislation Review Committee *Legislation Review Digest No 64/55 – 4 November 2014*.

⁵⁰ As was acknowledged in New South Wales Government Department of Premier and Cabinet, Better Regulation Office, REVIEW OF NSW REGULATORY GATEKEEPING AND IMPACT ASSESSMENT PROCESS, Issues Paper, September 2011, para 1.2.

cover some delegated legislation that is not already subject to the NSW SL Act.

A *Guide to Better Regulation* issued by the Premier in 2008 and later updated, sets out the procedures. It describes when consultation is advisable and what constitutes effective consultation.⁵¹ While regulatory impact assessments provided to the BRO must include a statement about the consultation undertaken, what is required is expressed at the level of very general advice, with the BRO not adopting a role of monitoring consultation.⁵² The BRO procedures lack public notification of the regulatory impact assessment or any specific requirement that consultation is to occur. The policy is an internal scrutiny mechanism, rather than a process for publication, consultation and review that promotes transparency.

§ 3 – FEDERAL RULE-MAKING

A) Reform

Federal regulations are scrutinised by the Senate Standing Committee on Regulations and Ordinances. The Committee applies a limited number of criteria, set out in standing orders.⁵³ It is a bipartisan committee, with strong expectations that the Senate will disallow a regulation if the Committee so recommends. The criteria are more limited than those applied in NSW, and do not include a criterion as to whether the delegated law-maker has engaged in regulatory impact assessment or provided adequate consultation.

In 1992 the Administrative Review Council (ARC) recommended the introduction of a “legislative instrument proposal”, or RIS requirement, similar to that in Victoria and NSW, together with consultation procedures, in the making of federal legislative instruments.⁵⁴ The ARC identified the advantages of an RIS as improvement in the quality of delegated legislation, or even a decision not to make it, by a process of potential revision as a result of its exposure to different views of interested groups.⁵⁵ According to this approach it is consultation that secures a benefit from an RIS requirement. The ARC rejected submissions made to it by some agencies that informal consultation suffices. The absence of a statutory requirement for consultation raises the risk of exclusion of legitimate points of view.⁵⁶

⁵¹ New South Wales Government Department of Premier and Cabinet, Better Regulation Office, *GUIDE TO BETTER REGULATION*, 2008, 2009, Section 3.

⁵² Issues Paper, *REVIEW OF NSW REGULATORY GATEKEEPING AND IMPACT ASSESSMENT PROCESSES* (September 2011).

⁵³ Commonwealth Parliament, *SENATE STANDING ORDERS* Order 23(3).

⁵⁴ Administrative Review Council, *RULE MAKING BY COMMONWEALTH AGENCIES*, Report No 35 (1992) Chapter 5.

⁵⁵ Administrative Review Council, *RULE MAKING BY COMMONWEALTH AGENCIES* Report No 35 (1992) paras 5.21, 5.22.

⁵⁶ Administrative Review Council, *RULE MAKING BY COMMONWEALTH AGENCIES* Report No 35 (1992) para 5.28.

During the 1990s several bills to implement the measures recommended by the ARC lapsed without enactment.⁵⁷ Finally, in 2003 the *Legislative Instruments Act* 2003 (Cth) (LI Act) was enacted. Its most important reform was the establishment of a Federal Register of Legislative Instruments (Register), modelled on the United States Register of similar name.⁵⁸ The LI Act was directed to ensuring transparency of legislative instruments in the sense that they were readily accessible by electronic means in one location.⁵⁹ Existing instruments were to be “backcaptured” over specified periods so that all instruments were ultimately entered on the Register. This strengthened the existing traditional provisions for notification and publication after instruments are made, enhancing transparency by ensuring that rules are accessible.

The LI Act added an additional mechanism that strengthened this ex post facto notification. Not only the instrument but also an explanatory statement for it was to be placed on the Register.⁶⁰ While there are exceptions, these statements are notoriously uninformative, being paraphrases of the clauses in the instrument. As is developed below, one feature of the requirements for explanatory statements had particular significance.

Several other reforms achieved by the LI Act have secondary significance for transparency. It introduced a uniform nomenclature for federal delegated legislation: “the legislative instrument”.⁶¹ Measures were put in place to improve the drafting of all legislative instruments.⁶²

However the LI Act did not implement the ARC’s recommendation for the introduction of an RIS.⁶³ While the LI Act introduced sunseting after 10 years for legislative instruments,⁶⁴ the significance of sunseting is diminished when the re-making of the instrument is not accompanied by an RIS or a real consultation procedure.

B) Public Notice and Consultation

The ARC’s recommendation that delegated law-makers have a duty to consult with interest groups before making instruments was

⁵⁷ Following the introduction of the Legislative Instruments Bill 1994 (Cth), two parliamentary committees reported, amendments were made in the Senate, but the bill lapsed when elections called in 1994. The Legislative Instruments Bill 1996 (Cth) incorporated amendment made to the 1994 Bill, but had a greater focus on reducing red tape for business. The Senate proposed amendments and returned the Bill to the House of Representatives, where in 1997 it was laid aside. The Legislative Instruments Bill (No 2) 1996 lapsed when federal elections were called in September 1996.

⁵⁸ LI Act Pt 4.

⁵⁹ LI Act Pt 4.

⁶⁰ The LI Act s 26 (former) required an explanatory statement to be lodged in the Register with the legislative instrument. Failure to do so did not affect the validity or enforceability of the instrument.

⁶¹ This regularisation of nomenclature assisted in removing uncertainty as to the status of some rules, sometimes called “quasi-legislation”. See also LI Act s 10.

⁶² LI Act Pt 2. Drafting is to be undertaken by parliamentary counsel.

⁶³ Administrative Review Council, RULE MAKING BY COMMONWEALTH AGENCIES Report No 35 (1992).

⁶⁴ LI Act Pt 6.

heavily diluted in the LI Act. Under the grand heading “Part 3 – Consultation Before Making Legislative Instruments” were just three sections: 17, 18 and 19. These sections did not deserve the description “consultation”.

Section 17(1) provided that before a rule-maker makes a legislative instrument, “particularly where the proposed instrument is likely to: (a) have a direct, or substantial indirect, effect on business; or (b) restrict competition”, the rule-maker “must be satisfied that any consultation that is considered by the rule-maker to be appropriate and reasonably practicable to undertake, has been undertaken”. This section did not impose a duty to consult. It emphasised that if consultation occurred, its extent was a matter of discretion. The foundation for the discretion as to the extent of consultation that was “appropriate” was an apparently unfettered discretion of the rule-maker to decide whether to consult at all.

Section 17(2) was a curious provision, inviting the rule-maker to look back on the decision, already made and implemented, regarding the nature of any consultation, and assess whether “the consultation that was undertaken is appropriate”. In answering that question, the rule-maker was expressly given a discretion to “have regard to any relevant matter”.

This included the extent to which the consultation drew on the knowledge of persons having expertise in fields relevant to the proposed instrument, and ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.⁶⁵ Section 17 did not disclose any particular purpose of this ex post facto reflection on the part of the rule-maker.

At the end of s 17 there appeared a note that the explanatory statement to be placed on the Register is to contain a description of the consultation undertaken, or, if there was no consultation, the explanation for its absence. This duty flowed, mysteriously, from the definition of “explanatory statement” in s 4 of the LI Act.⁶⁶

Consultation is of little value if the person consulted is not notified of the content of the proposed instrument. No provision was made in the LI Act for the proposed instrument to be notified to the public. Section 17(3) expressly gave the rule-maker a discretion as to whether

⁶⁵ Legislative Instruments Act s 17(2)(a) and (b).

⁶⁶ A review of the operation of consultation under the LI Act revealed that agencies seemed unaware of s 17: Senate Standing Committee on Regulations and Ordinances CONSULTATION UNDER THE LEGISLATIVE INSTRUMENTS ACT 2003 INTERIM REPORT 113th Report (June 2007). There was a lack of detail in explanatory statements of the consultation undertaken. The definition in s 4 of “explanatory statement” included, in s 4(d), a description of the nature of consultation if it was undertaken under s 17 before the instrument was made. This definition section was an inappropriate place to discuss consultation procedures. In 2012 subsection (1A) was inserted into s 26 of the LI Act, picking up the definition of explanatory statement. A note referring to s 26(1A) was inserted at the end of s 17. The s 4 definition was amended to simply refer to s 26. The explanatory statement also had to include a statement of compatibility prepared under the *Human Rights (Parliamentary Scrutiny) Act* 2011 (Cth): LI Act s 26(1A)(f) (former). The note stated that a failure to lodge the statement in accordance with s 26(1) did not affect the validity of the instrument: LI Act s 26(2).

the proposed rule was notified to bodies or representatives of persons likely to be affected by it, by providing that consultation “could involve notification, either directly or by advertisement”. Section 17(3) expressly provided that this reference to the possibility of advance public notification was not to limit by implication the form of any consultation which the rule-maker engaged in under s 17(1) (as a matter of discretion). That advance public notification and the content of any notification was entirely a matter for the discretion of the rule-maker, was given further emphasis. Section 17(3) went on to provide that any such notification, if it was done, “could invite submissions” by a specified date, “or might invite” participation in “public hearings”.

These references to consultation suggested that it was a path to be trod tentatively, only where necessary, and without offering too much. Section 17 sent a message of discouragement to rule-makers with regard to consulting. As if this were not sufficient, s 18(1) provided that despite s 17, the nature of an instrument may be such that “consultation might be unnecessary or inappropriate”.

There followed in s 18(2) a list of seven classes of instruments that were “examples” of those where the rule-maker may be satisfied that consultation is not necessary or appropriate. These included instruments of a minor or machinery nature; or required as a matter of urgency; or required by an issue of national security; or relating to service in the Australian Defence Force.⁶⁷ Two further classes were extremely broad. The first was any instrument relating to employment.⁶⁸ The second was an instrument that gives effect to a decision announced in the federal Budget that (i) repeals, imposes or adjusts a tax, fee or charge; (b) confers, revokes or alters an entitlement; or (c) imposes, revokes or alters an entitlement.⁶⁹

Finally, making it absolutely clear that transparency was not necessary, s 19 of the LI Act provided that if the rule-maker failed to consult, that failure to consult did not affect the validity or enforceability of an instrument.

C) Further Legislative Change

On 6 March 2016 the *Acts and Instruments (Framework Reform) Act* 2015 (Cth) (Framework Act) commenced. The LI Act was re-named the *Legislation Act* 2003 (Cth) (Legislation Act). The principal work of the amendments was to extend the Register to include Acts as well as instruments, re-naming it the Federal Register of Legislation. As to notification and consultation with respect to rule-making, little changed.

Section 17(1) is amended to remove the reference to giving particular attention to whether consultation is appropriate and reasonably practicable to undertake, where the proposed instrument will have a direct, or substantial indirect, effect on business, or restrict competition. Section 17(1) is now expressed in

⁶⁷ Legislative Instruments Act s 18(2)(a), (b), (d), (g).

⁶⁸ Legislative Instruments Act s 18(2)(f).

⁶⁹ Legislative Instruments Act s 18(2)(c).

more general terms, but still invites the rule-maker to reach a state of satisfaction as to whether it is “appropriate and ... reasonably practicable” to consult. The amendment to s 17(1) removes the suggestion that rule-makers might at least take a closer look at the possibility of consultation where the proposed instrument affects business or competition.

The note at the end of s 17 is amended to refer to s 15J(2), which is now the source of the duty to include in an explanatory statement accompanying an instrument the consultation undertaken.

Section 18 is repealed. This removes the added emphasis given to the absence of any duty to consult when certain classes of rules are made. It is of course true that there is no need to create exceptions when no duty to consult has been imposed.

Section 19 remains in place. This provision is in similar terms to the provision in the NSW SL Act that non-compliance with the RIS, public notification and consultation procedure does not invalidate a statutory rule. As discussed above, the approach here is that accountability in cases of non-compliance is to be secured through the legislative process. The requirements are not enforceable duties that may be supervised in judicial review. Whether it would be preferable ensure that a statutory requirement to consult is an enforceable duty is not explored here. The principal point to be made about s 19 is that the section is not necessary. Section 17 does not speak of any requirement at all but emphasises that a discretion exists.

The heading to Part 2 is removed. Sections 17 and 19 now belong to “Part 2 – Key Concepts for Legislative Instruments and Notifiable Instruments”.⁷⁰ The new heading, replacing the word “Consultation” with “Key Concepts” reflects more accurately the true position. Sections 17 and 19, in their original and current forms, do not promote consultation.

The current position as to general statutory duties to consult before making federal legislative instruments can be simply stated. There is no statutory requirement to prepare an RIS, or to notify the public that a proposed instrument is available for inspection. If consultation was undertaken under s 17 of the Legislation Act before the instrument was made, in the exercise of discretion, the explanatory statement for the instrument must contain a description of the nature of the consultation. If no consultation was undertaken, the statement must explain why no such consultation was undertaken.⁷¹

There is no distinct criterion relating to the matter of consultation to be applied by the Senate Standing Committee on Regulations and Ordinances. There is thus no statutory requirement to consult

⁷⁰ The new expression “notifiable instruments” should not be taken to indicate that notification requirements have been introduced. This is a new class of instruments of a machinery nature or concerned with commencement of instruments: Legislation Act s. 11. Notifiable instruments are not disallowable and do not sunset. Since ss 17 and 19 apply only to legislative instruments, the exception formerly made in s 18 for instruments of a machinery nature is widened through the new class.

⁷¹ Legislation Act s 15J(2)(d),(e).

nor, as it must follow, any accountability though the relevant scrutiny committee. The requirement to explain a failure to consult in the explanatory statement is in the nature of a duty to give reasons and has no further implication. The federal position stands in stark contrast to that in NSW. The public notification and RIS requirements that make consultation effective are not simply divorced from consultation. Rule-makers are implicitly reassured that consultation is optional and need not be pursued.

D) Non-Statutory Process

As in NSW, the federal legislative process now incorporates a non-statutory process of regulatory impact assessment. The federal Office of Best Practice Regulation (OBPR), a division of the Department of Finance and Deregulation, has administered a non-statutory requirement for regulatory impact assessment. Its work is driven by the policy of the Council of Australian Governments (COAG) on best practice regulatory impact analysis in the preparation of national regulatory proposals or national standards. Since the federal government's announcement in 2014 of a "cutting red-tape" policy, the OBPR has been located within the Department of Prime Minister and Cabinet.

A guide issued by the OBPR requires that regulation with a significant impact be accompanied by an RIS, but simply gives advice as to the different levels of consultation that might be appropriate.⁷² This policy based process does not provide for advance public notification of a proposed instrument, or for consultation with interested persons or groups, with an opportunity for comment. It is not directed to securing transparency.

E) Trans-Pacific Partnership

The Trans-Pacific Partnership (TPP) is a trade agreement amongst twelve Pacific rim countries, including the United States and Australia, signed on 4 February 2016, after seven years of negotiation. It contains measures to lower tariffs, promote innovation, productivity and competitiveness and establish an investor-state dispute settlement mechanism.

Chapter 26 – Transparency and Anti-Corruption in the TPP has not yet attracted attention in Australia. Australia is already compliant with the requirement in Article 26.2(5) to promptly publish a federal regulation of general application that affects the matters with which the TPP is concerned, together with an explanation of its purpose and rationale. This is covered by the Federal Register and the requirements under the Legislation Act to publish explanatory statements for legislative instruments and bills.

⁷² Department of Finance and Deregulation Office of Best Practice Regulation BEST PRACTICE REGULATION HANDBOOK (November 2006) Chapter 4, replaced by Department of Prime Minister and Cabinet Office of Best Practice Regulation THE AUSTRALIAN GOVERNMENT GUIDE TO REGULATION (2014) Chapter 5.

The TPP only requires such publication in the case of regulatory measures in the areas covered in the TPP.

The TPP speaks of measures, not just in a law or regulation, but also in a procedure or administrative ruling of general application with respect to a matter covered by the TPP. It is possible that some federal regulatory measures affecting these areas may be introduced through policy. Administrative rulings by regulatory agencies are not published on the Federal Register. The extent to which such rulings would otherwise be published may depend on whether they are adjudicative decisions or policies that are required to be published by the *Freedom of Information Act* 1982 (Cth).

However, Article 2.6 requires much more than publication at the end of the day. Article 26.2(2)(a) requires a party to the TPP, to the extent possible, to publish the regulatory measure in advance. Interested persons and other parties to the TPP are to be given a reasonable opportunity to comment on the proposed measures.⁷³ In the case of a proposed regulation by a party's central government with respect to any matter covered by the TPP, that is likely to affect trade or investment between the parties, each party is to publish the proposed regulation in an official journal or on an official website, preferably online and consolidated into a single portal.⁷⁴ The regulation should be published at least 60 days before comments are due, giving an interested person sufficient time to evaluate the proposed regulation.

When notified, the regulation should be accompanied by an explanation of its purpose and rationale.⁷⁵ There should be a period for receipt and consideration of comments. The party to the TPP is encouraged to explain any significant modifications made to the proposed regulation, preferably on an official website or in an online journal.

The political appetite for the TPP may currently be waning, including within Australia. If it does become necessary to draft legislation incorporating the requirements of the TPP into Australian domestic law, the federal reluctance to embrace statutory RIS and consultation procedures in rule-making might not be challenged. The federal government could attempt to discharge its obligations under Article 26.2(2)(a) and 26.2(4) by administrative procedures and policies. Policies are not binding and do not have the force of law. Footnote 2 to Article 26.2(4) proposes some methods for discharging the obligation that are less formal than statutory duties of notice and comment. If a policy based path were taken, it would be necessary to amend s 17 of the Legislation Act. However, s 17 does no work in any event, other than to provide implicit reassurance to rule-makers that they need not consult with the public.

⁷³ TPP Art 2.6(2)(b).

⁷⁴ TPP Art 2.6(4)(a).

⁷⁵ TPP Art 2.6(4)(c).

CONCLUSIONS

A complex scene persists in Australia with regard to general statutory requirements for giving public notice and an opportunity for comment before delegated legislation is made. A gulf exists between the position in NSW and the other States where an RIS, public notification and consultation regime has been adopted, and the general rule-making requirements at the federal level. The difference is not so stark in relation to non statutory RIS requirements for submitting proposed delegated legislation to a cabinet office for approval.

The genesis of the idea of combining public notice and consultation procedures with an RIS requirement was inspired in Victoria by notice and comment rule-making in the United States and underpinning theories of participation as a necessary element of the democratic process. The consultation procedure as it now operates in NSW does not approach a deliberative process, but does allow affected persons and interest groups to make their views known before a statutory rule is made. The federal approach is marked by a reluctance, or even fear, of imposing general notice and consultation requirements on rule-makers. That may persist, unaffected by any possible impact of Australia's obligations under the TPP.

This fractured picture as to the degree of transparency in the making of rules in Australia is interwoven with a confusion about the relationship between RIS requirements and public notice and consultation procedures. In NSW these are integrated and interdependent, with notice and consultation strengthening the effectiveness of the RIS in improving the rule made. At the federal level the policy based RIS requirements are regarded as important and effective, disconnected from any public notice or consultation other than steps taken voluntarily at the discretion of the rule-maker. Analysis of the relationship, no doubt with empirical input and a comparative approach, may make it possible to draw conclusions as to the role of transparency not only in promoting the democratic good of participation in government decision-making but also in securing the effectiveness of regulatory impact assessment.